THE LAW OF PERCOLATING WATERS.

PERCOLATING waters are well understood as being underground waters. Underground waters have been from time immemorial divided into two general classes, namely: (a) flowing streams, and (b) percolating waters. Percolating waters are divided by text writers into several distinct classes. No two text writers seem to have adopted the same classification. Such classifications are all more or less unimportant insofar as the application of the law is concerned. There cannot be any difference between percolating water which is diffuse and percolating water which reaches the channel of a stream or its sub-flow. All percolating water, unless detained by some natural obstruction, will eventually reach the body of a stream, either in the surface or sub-flow, and even where it is obstructed by some natural impediment, such as a dike or the like, when the basin becomes filled, all the percolating water thereafter coming in will either itself be forced out of the basin or will force out other water. Therefore any classification of percolating waters is merely academic and only made for the purpose of illustrating the different cases by the text writer who has made the classification.

There are very few legal definitions of percolating waters. Courts have treated this subject as one of science rather than law and seemed to satisfy themselves with the mere use of the term "percolating waters," as though they were satisfied that their character was so well known as to require no further elucidation.

However, the California court has defined them in a classical manner as "underground wandering drops moving by gravity in any and every direction along the line of least resistance."[1]

The law of percolating waters, as settled in England and in many of the states of this country, is that they belong to the land in which they exist and are part of the soil itself; that the owner of such land is the absolute owner of all percolating waters beneath the surface and has the right to use or dispose of the same as he sees fit, and may so exhaust the same from his own land as to withdraw them from the adjoining land.

This doctrine has been foreshadowed in England since early in the nineteenth century.[2] Many courts and text writers cite the case of *Acton* v. *Blundell*[3] as the first case establishing this rule of law,

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[1] Henshaw, J., in Los Angeles v. Hunter, 156 Calif. 603 at page 607.

[2] Cooper v. Barber, 3 Taun. 99; Balston v. Bensted, 1 Camp. 463, and other cases.

[3] 12 M. & W. 324.

while others say that this rule was first established by the case of *Chasemore* v. *Richards*.[4] The *Acton* case was decided in the Exchequer Chamber in 1843, and the *Chasemore* case by the House of Lords in 1859. It is not of much consequence which of these cases should be considered the leading case in England. The *Chasemore* case, which was decided by the highest court of England, seems to have received better consideration than the *Acton* case, and the opinion of the court is much more extensive, so we shall refer to that case principally for these reasons.

The *Chasemore* case held that a land- and mill-owner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by percolating water, and who had lost the use of the stream after another land-owner had dug, on his own ground, an extensive well for the purposes of supplying water to the inhabitants of the district, many of whom had no title, as land owners, to the use of the water, had no cause of action against such owner. Before considering this case it may be well to note briefly some prior English cases.

It was held in *Broadbent* v. *Ramsbotham*[5] that "All the water falling from heaven and shed upon the surface of the hill at the foot of which a brook runs must, by the natural course of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he may please and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel."

In the cast of *Acton* v. *Blundell*,[6] the Court of Exchequer was of the opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbor from doing so was *damnum absque injuria*.

In the case of *Balston* v. *Bensted*[7] LORD ELLENBOROUGH expressed an opinion that twenty years' enjoyment of the use of water in any manner afforded an exclusive presumption of right. But this statement amounted to no more than a dictum followed by no decision on the point, because the case ended in the withdrawal of a juror, and is directly at variance with the Court of Exchequer in the case of *Dickinson* v. *The Grand Junction Canal Company*,[8] in which the court declared "that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence

[4] 7 H. of L. Cas. 349.
[5] 11 Exch. Rep. 602.
[6] 12 M. & W. 324.
[7] 1 Camp. 463.
[8] 7 Exch. Rep. 282.

on the part of the riparian proprietors above and below, but is *ex jure naturæ,* and an incident of property as much as the right to have the soil itself in its natural state, unaltered by acts of a neighboring proprietor who cannot dig so as to deprive it of the support of his land."

In the *Dickinson* case the Court of Exchequer held that one, by digging a well and pumping out the water and so intercepting and diverting underground and percolating water which would otherwise have gone into the stream which flowed to plaintiff's mill and was applied to the working of it, had become liable in an action for the infringement of a right of the common law; but in that case the court refers to *Acton* v. *Blundell,* and observes "that the existence and state of underground water is generally unknown before a well is made; and after it is made there is the difficulty of knowing exactly how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbor. These practical uncertainties made it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters."

The court in the *Dickinson* case seemed to treat the matter of underground percolating waters as governed by the same rules as would obtain in the case of visible streams and water-courses on the surface, and the court in the *Chasemore* case says that these considerations greatly weaken the effect of the *Dickinson* case as an authority, but says that it is an authority to show that a right to water is not by a presumed grant from long acquiescence, but if it exists at all it is *jure naturae,* and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable in the case of waters percolating underground.

It thus seems clear that up to the time of the decision in the *Chasemore* case the common law of England, as to percolating waters, was in a somewhat uncertain state, but that case seemed to establish the law to the effect that percolating waters belong to the person owning the land and could be used by such person as he might please without liability to anyone.

Lord CRANWORTH said in the *Chasemore* case: "The right to running water has always been properly described as a natural right just like the right to the air we breathe; they are gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible and no one can interfere without knowing whether

he does or does not do injury to those who are above or below him; but if the doctrine could be applied to merely percolating water, as it is flowing through the soil and eventually reaching the same stream, it would always be a matter that would require the evidence of scientific men to state whether or not there had been an interruption and whether or not there had been an injury. It is a process of nature, not apparent, and therefore such percolating water has not received the protection which running water in a natural channel on the surface has always received."

LORD WENSLEYDALE, in his opinion in the *Chasemore* case, first disposed of the contention, made in the court below, that the judgment in the *Dickinson* case was practically over-ruled by the cases of *Rawstron* v. *Taylor*[9] and *Broadbent* v. *Ramsbotham*,[10] characterizing such contention as "certainly a mistake."

Lord WENSLEYDALE propounds an interesting query, and practically foreshadows the principles of *Katz* v. *Walkinshaw*, when he says: "If the River Wandle in this case had been supplied by natural streams flowing into the river above ground, or in known definite channels below ground, the cutting off those streams to which the person entitled to the use of the river was entitled *ex natura*, as feeders of the river, would be an injury to him and give a right of action. If this be true with regard to underground streams flowing through or into the river, then comes the difficulty how to distinguish the smaller rivulet and the drops of water which flow and percolate into and supply the river. They are all equally gifts of nature for the benefit of the proprietor of the soil through which and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil any more than the property of the water in the river which flows through it on the surface." Notwithstanding this statement, Lord WENSLEYDALE voted against the principle therein announced and in affirmance of the judgment.

Lord Chief Justice TINDAL, in *Acton* v. *Blundell*, says that case "rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is found to his own purposes at his free will and pleasure."

Lord WENSLEYDALE, after quoting this language, says: "If this applies to water underground in a natural course of transit (and

[9] 11 Exch. Rep. 369.
[10] 11 Exch. Rep. 602.

it must do so to be applicable at all), and not mere stagnant water, I concur with Judge COLERIDGE in his remark that the reason why it is, as such, more the subject of property than the water flowing above ground is not explained. (2 Hurl. & Nor., 192.) Surely the use of flowing water in each case, and not the property in it, belongs to the proprietor of the surface." Lord WENSLEYDALE further says: "What, then, is the distinction between the superficial streams and subterranean water? With respect to underground water percolating the strata, two considerations arise. In the first place, these subterranean waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbor's land of moisture, and even tap a copious spring, and prevent it flowing to his neighbor's close. It can rarely happen in excavating, in order to obtain the use of water, some injury will not be caused to the subterraneous supplies of a neighbor, especially as the precise course and direction of such water can seldom be known accurately beforehand. In the second place, as the great interests of society require that cultivation of every man's land should be encouraged and its natural advantage made fully available, the owner must be permitted to dig in his own soil, and in so doing he can rarely avoid interfering with the subterraneous waters flowing or percolating into his neighbor's land."

The English courts have gone so far as to hold that one may purchase land in order to secure the percolating water for the purpose of furnishing a municipal water supply and not be liable to the owner of the adjoining land, although the wells thereon be destroyed. In this case the land was used not only for the purpose of obtaining water for the municipality, but for the purpose of constructing sewers through the same.[11]

The Supreme Court of Massachusetts in 1836 announced the same rule as to percolating waters as that announced in the *Chasemore* case, in the case of *Greenleaf* v. *Francis*.[12]

In a comparatively late Wisconsin case this rule has been extended to holding that a land owner has the right to sink a well on his own land and use the water therefrom for any purpose as he

[11] New River v. Johnson, 2 E. & E. 435.
[12] 18 Pick. 117.

chooses, or even to allow it to flow away, regardless of the effect on his neighbor's wells, and that such right is not affected by malicious intent.[13] Many other cases of similar character might be cited.

The reason of the old rule is stated in numerous decisions, but probably the most concise statement may be found in the case of *Chatfield* v. *Wilson*,[14] as follows: "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law nor build upon it a system of rules as is done in the case of surface streams; their nature is defined and their progress over the surface may be seen and known and is uniform. They are not in the earth and a part of it, and no secret influence moves them, but they assume a distinct character from that of the earth and become subject to a certain law—the great law of gravitation."

There has always been a controversy between the authorities under the rule as to whether percolating water was property or was of such a nature as not to be susceptible to any of the rules of property. For instance, the Supreme Court of Pennsylvania held that while percolating waters were mineral they might be regarded as *ferae naturae*.[15] And in Georgia the Supreme Court has announced[16] that the owner of land has no rights in the water percolating beneath it which the law can recognize; and in *Wardner* v. *Springfield*[17] it was held that percolating water is not property within the protection of the Constitution.

The language of Mr. FARNHAM upon this proposition seems concise, clear and correct. He says[18]: "But the attempt to act upon that doctrine very soon forces the conclusion that percolating water is not an exception to the general rule that rights in organized society are not absolute but correlative, and that no one man can be permitted to exercise any right if the direct effect of his right will be an injury to his neighbors."

So we see that under the old rule great confusion in the authorities ensued, and that some rule should be established in order to give permanency to these rights and grant a remedy in case of their invasion.

It has always been held to be the law, both in England and America, that underground flowing streams can no more be inter-

[13] Huber v. Merkel, 117 Wis. 355.
[14] 28 Vt. 49.
[15] Westmoreland Nat. Gas Co. v. Dewitt, 130 Pa. 235.
[16] Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.
[17] 9 Ohio Dec. (Reprint) 855.
[18] Farnham on Waters, § 935.

fered with than surface streams. Bearing this in mind we fail to comprehend why a different rule should be applied to percolating waters. The only difference between flowing streams and diffuse percolating water, is their freeness and rapidity of movement. All waters, no matter how infinitesimal the particles or how large the volume may be, are governed by the same law. In flowing waters there are no sufficient natural impediments to prevent rapidity of motion, while in percolating waters nature has placed many impediments and their motion is much retarded. When a raindrop falls on a mountainside and sinks into the earth, unless it is destroyed or used up, it will eventually reach a flowing stream if there is any possible outlet thereto. Therefore, all drops of water should be considered as tributary to a flowing stream, although the process and period of reaching the stream may be entirely different.

The Supreme Court of California in the case of *Katz* v. *Walkinshaw*[19] refused to be bound by the English rule relative to the ownership of percolating waters, although the same court, in various cases decided before that time, had practically followed such rule.

The *Katz* case is therfore the leading case in the state of California, and a rather careful consideration thereof seems important to the full understanding of the entire subject as determined by the Supreme Court of that state. The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which was in part on or under the premises of plaintiffs, and to the water of which they had sunk wells, thereby causing the water to rise and flow upon their premises and which (they averred) had constantly flowed for twenty years before the wrong complained of was committed by defendant. This water was necessary for domestic purposes and for irrigating the lands of plaintiffs upon which there were growing trees, vines, shrubbery and other plants of great value to plaintiffs, and all of said plants would perish and plaintiff would be greatly and irreparably injured if defendant were allowed to divert the water. All of these facts were admitted, and the further fact that defendant intended to divert the water for sale to be used on lands of others, distant from the saturated belt from which the artesian water was derived.

There was an issue upon the question as to whether the sub-surface water constituted an underground stream, but this was immaterial in consideration of the question before the court.

The court below granted a non-suit, and plaintiffs appealed to the Supreme Court.

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[19] 141 Calif. 116.

Judge TEMPLE wrote the first opinion, but a rehearing was granted by the court for further argument because of the important character of the case. The court, however, on re-argument, re-affirmed the principles of law as stated in Judge TEMPLE'S opinion, and the opinion on the re-hearing was written by Judge SHAW.

Judge SHAW disposes of the theory that the common law of England was adopted by the Statute of California, approved April 13, 1850, by showing the difference between the conditions in California and those of England, the importance of waters and their use to a successful development of the state, and the inapplicability of the English law to these conditions. He clearly recognizes that one of the basic principles of the common law was its adaptability to various conditions, by the following language: "The true doctrine is that the common law by its own principles adapts itself to varying conditions and modifies its own rules so as to serve the ends of justice under the different circumstances," and concludes that "whenever it is found that, owing to the physical features and character of this state and the peculiarities of its climate, soil and production, the application of a given common law rule by our courts, tends constantly to cause injustice and wrong rather than the administration of justice and right, then the fundamental principles of right and justice on which the law is founded and which its administration is intended to promote, require that a different rule should be adopted, one which is calculated to secure persons in property and possessions and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this state, depends on whether it is suitable to our conditions under the rule just stated." He also clearly shows that by adoption of the English rule monopolies might be fostered and the development of the resources of the state retarded and says: "The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences."

Taking up generally the proposition involved, and after a reference to the prior California cases, Judge SHAW says: "We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the land owner; that he has no right either to have them continue to pass into his land as they would under natural conditions, or to prevent them from being drawn out of his land by any interference with natural conditions on neighboring land. Such

right as he has is therefore one which he cannot protect or enforce by a resort to legal means and one which he cannot depend on to continue permanently or for any definite period."

Upon the doctrine of a reasonable use he says: "The doctrine of reasonable use on the other hand affords some measure of protection to property now existing and greater justification for the attempt to make new developments. It limits the rights of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained or substantial damages awarded against those who carry it to distant lands. So far as the active interference of others is concerned thereafter, the danger to such undertakings is much less and the incentive to the development much greater from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from the attacks on title to water appropriated for use on distant land made by persons who claim the right to the reasonable use of such water on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams and must always be expected to attend claims to rights in a substance so movable as water. But the courts can protect this particular phase of property in water as effectively as water rights of any description."

Judge SHAW in brief simply applies the old rule of *non alienum laedas* and practically holds that the maxim *cujus est solum* does not apply. The opinion of Judge TEMPLE is also a remarkably able production; it concisely and very clearly refers to and canvasses the most important English cases announcing the English rule, and the cases in the United States which have departed from such rule.

The rule here announced is in effect that rights to percolating water are correlative and that no land owner absolutely owns the percolating water beneath the surface of his land, but has only a right to a reasonable use thereof upon such land; that the same right is held by each and all owners of land under which the percolating waters of any catchment basin exist.

It must be remembered that this decision is limited by its terms to the land owner's use of percolating water upon the land itself, and that before he can maintain an action against another for interference with this right he must show some appreciable damages.

One of the cases which Judge TEMPLE relies upon is that of *Smith* v. *The City of Brooklyn.*[20] In that case the city, for the purpose of furnishing a municipal water supply, sunk certain wells on its own land and pumped the percolating water therefrom, transporting the same some distance to the city and using it for municipal purposes. By this withdrawal of the percolating waters by the city, a brook and pond which had existed on adjoining land for some twenty years were completely destroyed. The court said: "While it is true that the city owned the land upon which it placed its structure and all of its acts were done upon its own property, it did not, however, make the erections or do the acts for any purpose of domestic use, agriculture, mining or manufacturing, as land was used in the cases which have arisen in this country. No one dwelt thereon or was expected to. No one used the water thereon, nor was it expected to be used in connection therewith. The sole purpose was to subordinate the use of the land to the particular purpose of a reservoir and conduit in which to gather, store and carry water to a distant place for its benefit and profit, and for the enjoyment of strangers who have no claim or shadow of right to it as against the plaintiff. It was its purpose, not only to take the water which might come by natural percolation upon its land, but also to use artificial means and by powerful suction pumps drain the adjoining land of its water. Its purpose has been accomplished, and by the construction of its conduits, the sinking of its wells, and the suction of its powerful pumps, the whole spring level of the surrounding country has been lowered and running streams and ponds dried up." The court held that the city was liable for damages to the adjoining land owner. This case was affirmed by the Court of Appeals.[21]

Forbell v. *The City of New York*,[22] is another case cited and relied upon by Judge TEMPLE. Here the City of New York had sunk wells on its own land, constructed machinery, pumped the percolating waters from under the surface of its own land, and transported them to some distance to the city for municipal purposes. By this action the percolating waters under the surface of adjoining land were extracted, and the land owner prevented from raising crops thereon. The court said: "Before the defendant constructed its wells and pumping stations it ascertained at least to a business certainty that such was the percolation and underground flow or situation of the waters on its own and plaintiff's land, that it could by these wells

[20] 46 N. Y. Supp. 141, 18 App. Div. 340.
[21] 160 N. Y. 357.
[22] 164 N. Y. 522.

and appliances cause or compel the waters in plaintiff's land to flow into its own wells, and thus deprive plaintiff of his natural supply of underground water," thus showing that the action was intentional on the part of the city. The court below followed the case of *Smith* v. *The City of Brooklyn*, and granted a perpetual injunction against the city from operating its engines, driven wells, and pumping stations on the land adjoining plaintiff's land, and awarded past damages to plaintiff in the sum of $6,000.00. This judgment was affirmed by the Court of Appeals, which announces the rule established as follows: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable so far as it is now apparent to us that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land, as land, either for the purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land, as land, may serve. He may consume it, but he must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped and their value impaired." And the court finally concluded as follows: "We more readily conclude to affirm because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in the court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is vastly more important than the celery and water and water cresses of which plaintiff's land was so productive before defendant encroached upon his water supply, but the defendant can employ the right of eminent domain and thus provide its people with water without injustice to plaintiff."

It must be remembered that the earlier cases in the state of New York had approved and adopted the English rule, but by the two above cases such rule has now been changed in that jurisdiction and the doctrine of reasonable use well established.

Bassett v. *Salisbury Manufacturing Company*,[23] is another case cited and relied upon by Judge TEMPLE. The action was for damages in obstructing the drainage of percolating water from plaintiff's land. The Supreme Court in New Hampshire discussed and decided the question of ownership of percolating water and the rights which attach thereto. That court in this case was the first one in the United States or elsewhere which distinctly and utterly departed from the rule of absolute ownership and announced the doctrine of reasonable use. The opinion of the court delivered by Judge BARTLETT is a legal classic; as Judge TEMPLE says in the *Katz* case: "By far the most satisfactory case on the subject is *Bassett* v. *Salisbury Manufacturing Company*. That was a most elaborately considered case and this precise question is discussed with a fulness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but as it is accessible to the profession I need only say I adopt it in full."

The opinion of Judge BARTLETT is without reference to any precedent but is based upon pure logic and should be read by everyone who is interested in the question under discussion.

Many decisions of the Supreme Courts of other states rendered since the *Katz* case was decided have followed the rule there adopted; two of the best considered of these cases are *Meeker* v. *East Orange*,[24] and *Erickson* v. *Crookston Water Company*.[25]

In the *Meeker* case the Chancellor[26] reviews extensively the English and American cases holding the old doctrine of percolating waters, and says: "A review of the reasoning upon which the English doctrine respecting percolating underground waters rests, will demonstrate, as we think, that this reasoning is unsatisfactory in itself and inconsistent with legal principles otherwise well established." He then refers to the case of *Acton* v. *Blundell*,[27] and says: "But as has been since repeatedly pointed out, the right of the riparian owner to the flow of a natural stream arises *ex jure naturae*, and not at all from prescription or presumed grant or acquiescence arising from long continued use." He then refers to the following paragraph of the opinion in the Acton case: "If the man who sinks the well on his own land can acquire by that act an absolute and indefeasible right to the water that collects in it he has the power of preventing his neighbor from making any use of the spring in his own soil which

[23] 43 N. H. 569.

[24] 77 N. J. L. 623, 74 Atl. 379.

[25] 100 Minn. 481, 111 N. W. 391.

[26] Chancellor Mahlon Pitney, now a member of the Supreme Court of the United States.

[27] 12 M. & W. 324.

shall interfere with the enjoyment of the well;" and then the Chancellor observes: "Obviously he failed to note that there is a middle ground between the existence of an absolute and indefeasible right and the absence of any right that the law will recognize and protect. There is room for the existence of qualified and correlative rights in both land owners. The English rule seems to be rested at bottom upon the maxim: *Cujus est solum ejus est usque ad coelum et ad inferos.* Thus in *Acton* v. *Blundell* (12 Mee. & Wells., 354), TINDAL, Chief Justice, said that the case fell within 'that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and pleasure.' Here the impracticability of applying the rule of absolute ownership to the fluid, water, which, by reason of its nature, is incapable of being subjected to such ownership, is apparently overlooked. If the owner of Whiteacre is the absolute proprietor of all the percolating water found beneath the soil, the owner of the neighboring Blackacre must, by the same rule, have the like proprietorship in his own percolating water. How, then, can it be consistent with the declared principle to allow the owner of Whiteacre to withdraw by pumping or otherwise, not only all the percolating water that is normally sub-adjacent to his own soil, but also at the same time the whole or a part of that which is normally sub-adjacent to Blackacre. Where percolating water exists in a state of nature generally throughout a tract of land whose parcels are held in several ownership by different proprietors, it is in the nature of things impossible to accord to each of these proprietors the absolute right of withdrawing *ad libitum* all percolating water which may be reached by a mill or pump upon any one of the several lots, for such withdrawal by one only necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners. Again the denial of the applicability to underground waters of the general principles of law that obtain with respect to water upon the surface of the earth is in part placed upon the mere difficulty of proving the facts respecting water that is concealed from view; but experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case by the production of satisfactory proof, the reason for the rule at once vanishes. It is sometimes said that unless the English rule be adopted land owners will be hampered in the development of their property because of the uncertainty that would thus be thrown about their rights. It seems to us that this

reasoning is wholly faulty. If the English rule is to obtain a man may discover, upon his own land, springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring land owner who may, with impunity, sink deeper wells and employ more powerful machinery, and thus wholly drain the sub-surface water from the land of the first discoverer." Later in the opinion he used the following language: "Upon the whole we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests is better supported by general principles of law and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, nor does it prevent any reasonable development of his land by mining or the like although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution, or sale for uses not connected with any beneficial ownership, or the enjoyment of the land whence they are taken, if it results therefrom that the owner of the adjacent or neighboring land is interfered with in his right to the reasonable user of sub-surface waters upon his land, or if his wells, springs or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."

In the *Crookston*[28] case the Supreme Court of Minnesota, after canvassing the English authorities, says: "In this country the English rule is not binding upon the American courts. It does not create rights and duties which American courts must recognize, as they would be compelled to recognize rights and duties created by that common law which is a part of the law of our land; like the law, for example, of trespass to persons or property. The American courts are confronted with varying and, in many cases, utterly different geological conditions and problems of water supply. It is evident on its face that rules which might work well in an island like England might operate disastrously if indiscriminately applied to so diversified a continent as this, with its overlying mountainous regions, its well-watered plains, its stretches of arid land once known

[28] Erickson v. Crookston Water Co., 100 Minn. 481, 111 N. W. 391.

as the 'Great American Desert,' and its different lake regions. Nothing is better settled than that the fundamental principles of right and justice, on which the common law is founded and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state and the peculiarities of its climate, soil, products and water supply, the application of a common law rule tends constantly to cause injustice and wrong rather than the administration of justice and right. Water, although in a large measure a commodity of commerce, is essential to the natural use of land for agriculture and other purposes, and to the support of human life, itself. A rigid rule applying to underground waters, the law applicable to surface waters in various jurisdictions might work insufferable hardship and put the control of an element as necessary to life as air itself into the hands of a monopoly. In the nature of things there are parts of the country as in this state, where well-defined bodies of water exist as unmistakably under the ground and out of sight as upon the surface of the ground. Under a proper system of legal rules this 'Gift of Providence' may be made to support agriculture, appropriate industries, and human life. Arbitrary and artificial restrictions might readily make large areas uninhabitable save by an unnatural tribute too exclusive in that control.

"The American Courts, taken as a whole, in recognition of such considerations, have viewed the matter from the point of view of public interests and of the natural use of natural advantages; that is to say, they have modified the supposedly absolute right of a man to use his own as he sees fit, under the maxim 'Whose the soil is, his it is from the Heavens to the depths of the earth,' by reference to the maxim of the safe law that 'One must use his own so as not to injure another.' It is not material whether this doctrine of correlative rights be regarded as the main rule, or whether the English cases be accepted as laying down the general rule to which the law recognizes many exceptions.."[29]

The writer has endeavored to call attention to the English rule, and the reason for its announcement. He has also endeavored to explain the rule of "reasonable use" and correlative rights, and the reason for its adoption in California. It would seem sufficient to say that the reasons for the English rule have, to a large extent, disappeared with the advancement of science and civilization—things

[29] This case again came before the Supreme Court of Minnesota, and is reported in 105 Minn. 182, 117 N. W. 435. But the doctrine announced in the foregoing opinion was not disturbed.

then thought to be hidden are now susceptible of being made plain—the reason of the rule ceasing, the rule ceases. Besides this, the utter dissimilarity of conditions as compared between California and England is so apparent, that the common law of England could not be safely followed here without deterioration in our development, danger of monopolies, and the obstruction of natural justice for which our American people are noted throughout the world.

It seems sufficient to say that the Supreme Court of California has, since the decision in the *Katz* case, never modified it, but its application to varied facts has caused exceptions to be adopted which can only be explained by a full consideration of the cases.

Since the decision of the *Katz* case the doctrine of "reasonable use" and correlative rights to percolating waters has been so fully adopted by so many courts that these principles are now supported by the weight of authority.

It must, then, stand to the credit of the Supreme Court of California that it was among the pioneers in the United States—and the pioneer in the West—in adopting this new doctrine, which is the only one based upon reason, justice and right; and that Court must be congratulated on the fact that so many of the later cases have adopted that decision as announcing the correct rule of law.

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